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HOUSE BILL 659

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

INTRODUCED BY

Al Park

AN ACT

RELATING TO TRUSTS; AMENDING AND ENACTING CERTAIN SECTIONS OF
THE UNIFORM PRINCIPAL AND INCOME ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 46-3A-102 NMSA 1978 (being Laws 2001,
Chapter 113, Section 102) is amended to read:

"46-3A-102. DEFINITIONS.--As used in the Uniform
Principal and Income Act:

[~~(1)~~] A. "accounting period" means a calendar year
unless another twelve-month period is selected by a fiduciary.
The term includes a portion of a calendar year or other twelve-
month period that begins when an income interest begins or ends
when an income interest ends;

[~~(2)~~] B. "beneficiary" includes, in the case of a
decedent's estate, an heir and devisee and, in the case of a

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1 trust, an income beneficiary and a remainder beneficiary;

2 [~~3~~] C. "fiduciary" means a personal
3 representative or a trustee. The term includes an executor,
4 administrator, successor personal representative, special
5 administrator and a person performing substantially the same
6 function;

7 [~~4~~] D. "income" means money or property that a
8 fiduciary receives as current return from a principal asset.
9 The term includes a portion of receipts from a sale, exchange
10 or liquidation of a principal asset, to the extent provided in
11 Article 4 of the Uniform Principal and Income Act;

12 [~~5~~] E. "income beneficiary" means a person to
13 whom net income of a trust is or may be payable;

14 [~~6~~] F. "income interest" means the right of an
15 income beneficiary to receive all or part of net income,
16 whether the terms of the trust require it to be distributed or
17 authorize it to be distributed in the trustee's discretion;

18 [~~7~~] G. "mandatory income interest" means the
19 right of an income beneficiary to receive net income that the
20 terms of the trust require the fiduciary to distribute;

21 [~~8~~] H. "net income" means the total receipts
22 allocated to income during an accounting period minus the
23 disbursements made from income during the period, plus or minus
24 transfers under the Uniform Principal and Income Act to or from
25 income during the period;

.154468.1

1 ~~[(9)]~~ I. "person" means an individual, corporation,
2 business trust, estate, trust, partnership, limited liability
3 company, association, joint venture, government; governmental
4 subdivision, agency or instrumentality; public corporation; or
5 any other legal or commercial entity;

6 ~~[(10)]~~ J. "principal" means property held in trust
7 for distribution to a remainder beneficiary when the trust
8 terminates;

9 K. "qualified beneficiary" means a beneficiary who,
10 on the date the beneficiary's qualification is determined:

11 (1) is a distributee or a permissible
12 distributee of trust income or principal;

13 (2) would be a distributee or permissible
14 distributee of trust income or principal if the interest of the
15 distributees described in Paragraph (1) of this subsection
16 terminated on that date; or

17 (3) would be a distributee or permissible
18 distributee of trust income or principal if the trust
19 terminated on that date;

20 ~~[(11)]~~ L. "remainder beneficiary" means a person
21 entitled to receive principal when an income interest ends;

22 ~~[(12)]~~ M. "terms of a trust" means the
23 manifestation of the intent of a settlor or decedent with
24 respect to the trust, expressed in a manner that admits of its
25 proof in a judicial proceeding, whether by written or spoken

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1 words or by conduct; [~~and~~]

2 N. "total return trust" means a trust that is
3 converted to a total return trust pursuant to Section 46-3A-105
4 NMSA 1978 or a trust the terms of which manifest the settlor's
5 intent that the trustee will administer the trust in accordance
6 with Section 46-3A-106 NMSA 1978; and

7 [~~(13)~~] O. "trustee" includes an original,
8 additional or successor trustee, whether or not appointed or
9 confirmed by a court."

10 Section 2. Section 46-3A-104 NMSA 1978 (being Laws 2001,
11 Chapter 113, Section 104) is amended to read:

12 "46-3A-104. TRUSTEE'S POWER TO ADJUST.--

13 (a) A trustee may adjust between principal and
14 income to the extent the trustee considers necessary if the
15 trustee invests and manages trust assets as a prudent investor,
16 the terms of the trust describe the amount that may or must be
17 distributed to a beneficiary by referring to the trust's
18 income, and the trustee determines, after applying the rules in
19 Subsection (a) of Section [~~103(a)~~] 46-3A-103 NMSA 1978, that
20 the trustee is unable to comply with Subsection (b) of Section
21 [~~103(b)~~] 46-3A-103 NMSA 1978.

22 (b) In deciding whether and to what extent to
23 exercise the power conferred by Subsection (a) of this section,
24 a trustee shall consider all factors relevant to the trust and
25 its beneficiaries, including the following factors to the

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1 extent they are relevant:

2 (1) the nature, purpose and expected duration
3 of the trust;

4 (2) the intent of the settlor;

5 (3) the identity and circumstances of the
6 beneficiaries;

7 (4) the needs for liquidity, regularity of
8 income, and preservation and appreciation of capital;

9 (5) the assets held in the trust; the extent
10 to which they consist of financial assets, interests in closely
11 held enterprises, tangible and intangible personal property or
12 real property; the extent to which an asset is used by a
13 beneficiary; and whether an asset was purchased by the trustee
14 or received from the settlor;

15 (6) the net amount allocated to income under
16 the other sections of the Uniform Principal and Income Act and
17 the increase or decrease in the value of the principal assets,
18 which the trustee may estimate as to assets for which market
19 values are not readily available;

20 (7) whether and to what extent the terms of
21 the trust give the trustee the power to invade principal or
22 accumulate income or prohibit the trustee from invading
23 principal or accumulating income, and the extent to which the
24 trustee has exercised a power from time to time to invade
25 principal or accumulate income;

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1 (8) the actual and anticipated effect of
2 economic conditions on principal and income and effects of
3 inflation and deflation; and

4 (9) the anticipated tax consequences of an
5 adjustment.

6 (c) A trustee may not make an adjustment:

7 (1) that diminishes the income interest in a
8 trust that requires all of the income to be paid at least
9 annually to a surviving spouse and for which an estate tax or
10 gift tax marital deduction would be allowed, in whole or in
11 part, if the trustee did not have the power to make the
12 adjustment;

13 (2) that reduces the actuarial value of the
14 income interest in a trust to which a person transfers property
15 with the intent to qualify for a gift tax exclusion;

16 (3) that changes the amount payable to a
17 beneficiary as a fixed annuity or a fixed fraction of the value
18 of the trust assets;

19 (4) from any amount that is permanently set
20 aside for charitable purposes under a will or the terms of a
21 trust unless both income and principal are so set aside;

22 (5) if possessing or exercising the power to
23 make an adjustment causes an individual to be treated as the
24 owner of all or part of the trust for income tax purposes, and
25 the individual would not be treated as the owner if the trustee

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1 did not possess the power to make an adjustment;

2 (6) if possessing or exercising the power to
3 make an adjustment causes all or part of the trust assets to be
4 included for estate tax purposes in the estate of an individual
5 who has the power to remove a trustee or appoint a trustee, or
6 both, and the assets would not be included in the estate of the
7 individual if the trustee did not possess the power to make an
8 adjustment;

9 (7) if the trustee is a beneficiary of the
10 trust; ~~[or]~~

11 (8) if the trustee is not a beneficiary, but
12 the adjustment would benefit the trustee directly or
13 indirectly; or

14 (9) if the trust is a total return trust.

15 (d) If Paragraph (5), (6), (7) or (8) of Subsection
16 (c) [~~(5), (6), (7) or (8)~~] of this section applies to a trustee
17 and there is more than one trustee, a ~~[co-trustee]~~ co-trustee to
18 whom the provision does not apply may make the adjustment
19 unless the exercise of the power by the remaining trustee or
20 trustees is not permitted by the terms of the trust.

21 (e) A trustee may release the entire power
22 conferred by Subsection (a) of this section or may release only
23 the power to adjust from income to principal or the power to
24 adjust from principal to income if the trustee is uncertain
25 about whether possessing or exercising the power will cause a

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1 result described in Paragraphs (1) through (6) or Paragraph (8)
2 of Subsection (c) [~~(1) through (6) or (e)(8)~~] of this section
3 or if the trustee determines that possessing or exercising the
4 power will or may deprive the trust of a tax benefit or impose
5 a tax burden not described in Subsection (c) of this section.

6 The release may be permanent or for a specified period,
7 including a period measured by the life of an individual.

8 (f) Terms of a trust that limit the power of a
9 trustee to make an adjustment between principal and income do
10 not affect the application of this section unless it is clear
11 from the terms of the trust that the terms are intended to deny
12 the trustee the power of adjustment conferred by Subsection (a)
13 of this section."

14 Section 3. A new section of the Uniform Principal and
15 Income Act, Section 46-3A-105 NMSA 1978, is enacted to read:

16 "46-3A-105. [NEW MATERIAL] CONVERSION TO TOTAL RETURN
17 TRUST.--

18 A. Unless expressly prohibited by the governing
19 instrument, a trustee may release the power to adjust as
20 provided in Section 46-3A-104 NMSA 1978 or convert a trust to a
21 total return trust as provided in this section if all of the
22 following apply:

23 (1) the trust describes the amount that may or
24 must be distributed to a beneficiary by referring to the
25 trust's income and the trustee determines that conversion to a

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1 total return trust will enable the trustee to better carry out
2 the purposes of the trust;

3 (2) the trustee provides a written notice of
4 the trustee's decision to convert the trust to a total return
5 trust specifying a prospective effective date for the
6 conversion that may not be sooner than sixty days after the
7 notice is provided to the qualified beneficiaries, determined
8 as of the date the notice is provided and assuming nonexercise
9 of all powers of appointment;

10 (3) there are one or more legally competent
11 beneficiaries as provided in Paragraph (1) of Subsection K of
12 Section 46-3A-102 NMSA 1978 and one or more legally competent
13 remainder beneficiaries described in either Paragraph (1) or
14 (2) of Subsection K of Section 46-3A-102 NMSA 1978, determined
15 as of the date the notice is provided; and

16 (4) no beneficiary has objected in writing to
17 the conversion to a total return trust and noticed the
18 objection to the trustee within sixty days after the notice was
19 provided.

20 B. Conversion to a total return trust or
21 reconversion to an income trust may be made by agreement
22 between the trustee and all qualified beneficiaries of the
23 trust. The trustee and all qualified beneficiaries may also
24 agree to modify the distribution percentage, except that the
25 trustee and the qualified beneficiaries may not agree to a

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1 distribution percentage less than three percent or greater than
2 five percent.

3 C. The trustee may elect to petition the court to
4 order conversion to a total return trust, including the reason
5 that conversion under Subsection A of this section is
6 unavailable because:

7 (1) a beneficiary timely objects to the
8 conversion to a total return trust;

9 (2) there are no legally competent
10 beneficiaries described in Paragraph (1) of Subsection K of
11 Section 46-3A-102 NMSA 1978; or

12 (3) there are no legally competent
13 beneficiaries described in Paragraph (1) or (2) of Subsection K
14 of Section 46-3A-102 NMSA 1978.

15 D. A beneficiary may request the trustee to convert
16 to a total return trust or adjust the distribution percentage
17 pursuant to this section. If the trustee declines or fails to
18 act within six months after receiving a written request from a
19 beneficiary to do so, the beneficiary may petition the court to
20 order the conversion or adjustment.

21 E. The trustee may petition the court prospectively
22 to reconvert from a total return trust or to adjust the
23 distribution percentage if the trustee determines that the
24 reconversion or adjustment will enable the trustee to better
25 carry out the purposes of the trust. A beneficiary may request

1 the trustee to petition the court prospectively to reconvert
2 from a total return trust or adjust the distribution
3 percentage. If the trustee declines or fails to act within six
4 months after receiving a written request from a beneficiary to
5 do so, the beneficiary may petition the court to order the
6 reconversion or adjustment.

7 F. In a judicial proceeding instituted under this
8 section, the trustee may present information concerning:

9 (1) the trustee's support for, or opposition
10 to, a conversion to a total return trust, a reconversion from a
11 total return trust or an adjustment of the distribution
12 percentage of a total return trust, including whether the
13 trustee believes conversion, reconversion or adjustment of the
14 distribution percentage would enable the trustee to better
15 carry out the purposes of the trust; and

16 (2) any other matter relevant to the proposed
17 conversion, reconversion or adjustment of the distribution
18 percentage.

19 G. A trustee's actions undertaken in accordance
20 with this section shall not be determined improper or
21 inconsistent with the trustee's duty of impartiality unless the
22 court finds from all the evidence that the trustee acted in bad
23 faith.

24 H. The court may order conversion to a total return
25 trust, reconversion prospectively from a total return trust or

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1 adjustment of the distribution percentage of a total return
2 trust if the court determines that the conversion, reconversion
3 or adjustment of the distribution percentage will enable the
4 trustee to better carry out the purposes of the trust.

5 I. If a conversion to a total return trust is made
6 pursuant to a court order, the trustee may reconvert the trust
7 to an income trust only:

8 (1) pursuant to a subsequent court order; or

9 (2) by filing with the court an agreement made
10 pursuant to Subsection B of this section to reconvert to an
11 income trust.

12 J. Upon a reconversion, the power to adjust, as
13 described in Section 46-3A-104 NMSA 1978 and as it existed
14 before the conversion, shall be revived.

15 K. An action may be taken under this section no
16 more frequently than every three years, unless the court for
17 good cause orders otherwise."

18 Section 4. A new section of the Uniform Principal and
19 Income Act, Section 46-3A-106 NMSA 1978, is enacted to read:

20 "46-3A-106. [NEW MATERIAL] ADMINISTRATION OF TOTAL RETURN
21 TRUST.--

22 A. During the period that a trust is a total return
23 trust, the trustee shall administer the trust in accordance
24 with the provisions of this section unless otherwise expressly
25 provided by the terms of the trust.

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1 B. The trustee shall invest the trust assets
2 seeking a total return without regard to whether the return is
3 from income or appreciation of principal.

4 C. The trustee shall make income distributions in
5 accordance with the governing instrument subject to the
6 provisions of this section.

7 D. The distribution percentage for any trust
8 converted to a total return trust by a trustee in accordance
9 with Subsection A of Section 46-3A-105 NMSA 1978 shall be four
10 percent, unless a different percentage has been determined in
11 an agreement made pursuant to Subsection B of Section 46-3A-105
12 NMSA 1978 or ordered by the court pursuant to Subsection C of
13 Section 46-3A-105 NMSA 1978.

14 E. The trustee shall pay to a beneficiary in the
15 case of an underpayment within a reasonable time, and shall
16 recover from a beneficiary in the case of an overpayment,
17 either by repayment by the beneficiary or by withholding from
18 future distributions to the beneficiary:

19 (1) an amount equal to the difference between
20 the amount properly payable and the amount actually paid; and

21 (2) interest compounded annually at a rate per
22 annum equal to the distribution percentage in the year or years
23 during which the underpayment or overpayment occurs; provided
24 that accrual of interest may not commence until the beginning
25 of the trust year following the year in which the underpayment

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1 or overpayment occurs.

2 F. As used in Sections 46-3A-105 through 46-3A-113
3 NMSA 1978:

4 (1) "income" as the term appears in the
5 governing instrument means the distribution amount;

6 (2) "distribution amount" means the annual
7 amount equal to the distribution percentage multiplied by the
8 average net fair market value of the trust's assets; and

9 (3) "average net fair market value of the
10 trust's assets" means the net fair market value of the trust's
11 assets averaged over the lesser of the three preceding years or
12 the period during which the trust has been in existence."

13 Section 5. A new section of the Uniform Principal and
14 Income Act, Section 46-3A-107 NMSA 1978, is enacted to read:

15 "46-3A-107. [NEW MATERIAL] DETERMINATION OF MATTERS IN
16 ADMINISTRATION.--

17 A. The trustee may determine any of the following
18 matters in administering a total return trust as the trustee
19 deems necessary or helpful for the proper functioning of the
20 trust:

21 (1) the effective date of a conversion to a
22 total return trust pursuant to Section 46-3A-105 NMSA 1978;

23 (2) the manner of prorating the distribution
24 amount for a short year in which a beneficiary's interest
25 commences or ceases, or, if the trust is a total return trust

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1 for only part of the year, the trustee may elect to treat the
2 trust year as two separate years, the first of which ends at
3 the close of the day on which the conversion or reconversion
4 occurs, and the second of which ends at the close of the trust
5 year;

6 (3) whether distributions are made in cash or
7 in-kind;

8 (4) the manner of adjusting valuations and
9 calculations of the distribution amount to account for other
10 payments from, or contributions to, the trust;

11 (5) whether to value the trust's assets
12 annually or more frequently;

13 (6) which valuation dates to use and how many
14 valuation dates to use; and

15 (7) valuation decisions concerning any asset
16 for which there is no readily available market value,
17 including:

18 (a) how frequently to value the asset;

19 (b) whether and how often to engage a
20 professional appraiser to value the asset; and

21 (c) whether to exclude the value of the
22 asset from the net fair market value of the trust's assets for
23 purposes of determining the distribution amount.

24 B. For purposes of this section, any asset excluded
25 pursuant to Subparagraph (c) of Paragraph (7) of Subsection A

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1 of this section shall be referred to as an "excluded asset" and
2 the trustee shall distribute any net income received from the
3 excluded asset as provided for in the governing instrument,
4 subject to the following principles:

5 (1) the trustee shall treat each asset for
6 which there is no readily available market value as an excluded
7 asset unless the trustee determines that there are compelling
8 reasons not to do so and the trustee considers all relevant
9 factors, including the best interests of the beneficiaries;

10 (2) if tangible personal property or real
11 property is possessed or occupied by a beneficiary, the trustee
12 may not limit or restrict any right of the beneficiary to use
13 the property in accordance with the governing instrument
14 regardless of whether the trustee treats the property as an
15 excluded asset;

16 (3) assets for which there is a readily
17 available market value include cash and cash equivalents;
18 stocks, bonds and other securities and instruments for which
19 there is an established market on a stock exchange, in an
20 over-the-counter market or otherwise; and any other property
21 that can reasonably be expected to be sold within one week of
22 the decision to sell without extraordinary efforts by the
23 seller;

24 (4) assets for which there is no readily
25 available market value include stocks, bonds and other

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1 securities and instruments for which there is no established
2 market on a stock exchange, in an over-the-counter market or
3 otherwise; real property; tangible personal property; and
4 artwork and other collectibles."

5 Section 6. A new section of the Uniform Principal and
6 Income Act, Section 46-3A-108 NMSA 1978, is enacted to read:

7 "46-3A-108. [NEW MATERIAL] DISTRIBUTION OF TOTAL RETURN
8 TRUST.--

9 A. Expenses, taxes and other charges that would
10 otherwise be deducted from income if the trust was not a total
11 return trust may not be deducted from the distribution amount.

12 B. Unless otherwise provided by the governing
13 instrument, the distribution amount each year shall be deemed
14 to be paid from the following sources for that year in the
15 following order:

16 (1) net income determined as if the trust were
17 not a total return trust;

18 (2) other ordinary income as determined for
19 federal income tax purposes;

20 (3) net realized short-term capital gains as
21 determined for federal income tax purposes;

22 (4) net realized long-term capital gains as
23 determined for federal income tax purposes;

24 (5) trust principal comprising assets for
25 which there is a readily available market value; and

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1 (6) other trust principal."

2 Section 7. A new section of the Uniform Principal and
3 Income Act, Section 46-3A-109 NMSA 1978, is enacted to read:

4 "46-3A-109. [NEW MATERIAL] RESTRICTIONS ON
5 DISTRIBUTIONS.--

6 A. The distribution amount may not be less than the
7 net income of the trust, determined without regard to the
8 provisions of this section, either:

9 (1) for a trust for which an estate tax or a
10 gift tax marital deduction was claimed or may be claimed, in
11 whole or in part, but only during the lifetime of the spouse
12 for whom the trust was created; or

13 (2) for a trust that was exempt, in whole or
14 in part, from generation-skipping transfer tax on the effective
15 date of this section by reason of any effective date or
16 transition rule.

17 B. Conversion to a total return trust shall not
18 affect any provisions in the governing instrument:

19 (1) that directs or authorizes the trustee to
20 distribute principal;

21 (2) that directs or authorizes the trustee to
22 distribute a fixed annuity or a fixed fraction of the value of
23 trust assets;

24 (3) that authorizes a beneficiary to withdraw
25 a portion or all of the principal; or

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1 (4) that in any manner diminishes an amount
2 permanently set aside for charitable purposes under the
3 governing instrument unless both income and principal are set
4 aside."

5 Section 8. A new section of the Uniform Principal and
6 Income Act, Section 46-3A-110 NMSA 1978, is enacted to read:

7 "46-3A-110. [NEW MATERIAL] LIMITATIONS ON CONVERSION.--If
8 a trustee is also a beneficiary of the trust and conversion or
9 failure to convert would enhance or diminish the beneficial
10 interest of that trustee, or if possession or exercise of the
11 conversion power by a particular trustee alone would cause any
12 individual to be treated as owner of a part of the trust for
13 federal income tax purposes or cause a part of the trust to be
14 included in the gross estate of any individual for federal
15 estate tax purposes, then that trustee may not participate as a
16 trustee in the exercise of the conversion power, except that:

17 A. the trustee may petition the court under
18 Subsection C of Section 46-3A-105 NMSA 1978 to order conversion
19 in accordance with this section; and

20 B. a co-trustee or co-trustees to whom this section
21 does not apply may convert the trust to a total return trust in
22 accordance with Sections 46-3A-105 and 46-3A-106 NMSA 1978."

23 Section 9. A new section of the Uniform Principal and
24 Income Act, Section 46-3A-111 NMSA 1978, is enacted to read:

25 "46-3A-111. [NEW MATERIAL] RELEASE.--A trustee may

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1 irrevocably release the power granted by the provisions of
2 Sections 46-3A-105 through 46-3A-113 NMSA 1978 if the trustee
3 reasonably believes the release is in the best interests of the
4 trust and its beneficiaries. The release may be personal to
5 the releasing trustee or it may apply generally to some or all
6 subsequent trustees. The release may be for any specified
7 period, including a period measured by the life of an
8 individual."

9 Section 10. A new section of the Uniform Principal and
10 Income Act, Section 46-3A-112 NMSA 1978, is enacted to read:

11 "46-3A-112. [NEW MATERIAL] REMEDIES.--

12 A. A trustee who reasonably and in good faith takes
13 any action or omits to take any action pursuant to Sections
14 46-3A-105 through 46-3A-113 NMSA 1978 is not liable to any
15 person interested in the trust. An act or omission by a
16 trustee pursuant to those sections shall be presumed to be
17 reasonable and undertaken in good faith unless the act or
18 omission is determined by the court to have been an abuse of
19 discretion.

20 B. If a trustee reasonably and in good faith takes
21 or omits to take any action pursuant to Sections 46-3A-105
22 through 46-3A-113 NMSA 1978 and a person interested in the
23 trust opposes the act or omission, the person's exclusive
24 remedy shall be to seek an order of the court directing the
25 trustee to:

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- 1 (1) convert the trust to a total return trust;
2 (2) reconvert from a total return trust;
3 (3) change the distribution percentage; or
4 (4) order any administrative procedures the
5 court determines are necessary or helpful for the proper
6 functioning of the trust.

7 C. A claim for relief pursuant to Sections
8 46-3A-105 through 46-3A-113 NMSA 1978 that is not barred by
9 adjudication, consent or limitation is nevertheless barred as
10 to any beneficiary who has received a written notice fully
11 disclosing the matter unless a proceeding to assert the claim
12 is commenced within six months after receipt of the statement."

13 Section 11. A new section of the Uniform Principal and
14 Income Act, Section 46-3A-113 NMSA 1978, is enacted to read:

15 "46-3A-113. [NEW MATERIAL] TRUSTEE'S DUTY TO INFORM.--A
16 trustee has no duty to inform a beneficiary about the
17 availability and provisions of Sections 46-3A-105 through
18 46-3A-112 NMSA 1978. A trustee has no duty to review the trust
19 to determine whether any action should be taken under Sections
20 46-3A-105 through 46-3A-112 NMSA 1978 unless the trustee is
21 requested in writing by a qualified beneficiary to conduct the
22 review."

23 Section 12. A new section of the Uniform Principal and
24 Income Act, Section 46-3A-114 NMSA 1978, is enacted to read:

25 "46-3A-114. [NEW MATERIAL] APPLICABILITY.--

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1 A. Sections 46-3A-105 through 46-3A-113 NMSA 1978
2 shall apply to trusts in existence on July 1, 2005 and to
3 trusts created on or after that date.

4 B. Sections 46-3A-105 through 46-3A-113 NMSA 1978
5 shall be construed to apply to the administration of a trust
6 that is administered in New Mexico under New Mexico law or that
7 is governed by New Mexico law with respect to the meaning and
8 effect of its terms unless:

9 (1) the trust is a trust described in Section
10 170(f)(2)(B), 664(d), 2702(a)(3) or 2702(b) of the federal
11 Internal Revenue Code of 1986;

12 (2) the governing instrument expressly
13 prohibits the use of Sections 46-3A-105 through 46-3A-113 NMSA
14 1978 by specific reference to one or more provisions of those
15 sections; or

16 (3) the terms of a trust in existence on July
17 1, 2005 incorporate provisions that operate as a total return
18 trust. The trustee or a beneficiary of such a trust may adopt
19 provisions in Sections 46-3A-105 through 46-3A-113 NMSA 1978
20 that do not contradict provisions in the governing instrument."

21 Section 13. EFFECTIVE DATE.- -The effective date of the
22 provisions of this act is July 1, 2005.